IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927.

No. 150.

JOHN C. DENNY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellants,

v.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Respondent.

APPEAL FROM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

STATEMENT OF THE CASE.

This is a direct appeal under Section 266 of the Judicial Code from the judgment and decree (R. 193) of the District Court of the United States, for

the Western District of Washington, Southern Division, signed May 8, 1926, and filed May 19, 1926. The decision of the trial court was entered April 22, 1926, (*Pacific Tel. and Tel. Co. v. Whitcomb et al.*, 12 Fed. 2nd, 279).

The scope of this brief is limited to a discussion of such assignments of error appearing in the record as relate to the franchise relations between respondent, The Pacific Telephone and Telegraph Company, and the cities of Seattle and Tacoma. Throughout the brief the City of Seattle will be referred to as "Seattle," the City of Tacoma as "Tacoma," and respondent The Pacific Telephone and Telegraph Company, will be referred to as the "Pacific Company."

The pertinent facts in the case are briefly as follows:

By Ordinance No. 4985, approved July 19, 1898, Seattle granted to the Sunset Telephone and Telegraph Company a franchise to continue to maintain and operate its then existing telephone and telegraph system within the City, and to erect, maintain and operate such additional poles, wires and other apparatus upon the streets of the city as might be necessary for its telephone and telegraph business, for a period of twenty-five (25) years (R. 250). This franchise, commonly known as the "Sunset Franchise," was assigned to the Pacific Company on January 8, 1917 (R. 222), and expired on July 19, 1923 (R. 220).

By Ordinance No. 6498, effective January 21, 1901, Seattle granted to John S. McGroaty and George C. Blanker a franchise to lay down, construct and erect, maintain and operate telephone lines, conduits, facilities and equipment in all of the public streets of the city for a period of twenty-five (25) years (R. 140). Said franchise, commonly known as the "Independent Franchise," was duly accepted by the grantees named therein, and was subsequently assigned, by sundry mesne conveyances, to the Pacific Company (R. 210, 211). Said assignment was ratified by Ordinance No. 7143 of Seattle (R. 149). At the time of the commencement of this suit said franchise had not expired nor had it expired at the time of trial. Section 7 of said Ordinance No. 6498 is in words and figures as follows, to-wit:

"That the grantees herein, their successors and assigns, shall not, during the continuance of this franchise, charge or receive for rent, or for the use of each telephone furnished by the grantees, their successors and assigns, under this franchise any greater rates or sums than the following, to-wit: For a business telephone (one party line) Four Dollars ($4.00) per month; for a business telephone (two party lines) three and 50/100 Dollars ($3.50) per month; for a residence telephone (one party line) two and 50/100 Dollars ($2.50) per month; for a residence telephone (two party line) Two Dollars ($2.00) per month; the foregoing rates shall be the maximum rates to be charged and received for such telephones."

Subsequent to the granting of said Independent Franchise, to-wit: On the 29th day of September,

1911, the Public Service Commission of Washington, a rate regulating body established by state law, made and entered in its Cause No. 31 an order authorizing certain of the rates prescribed by Section 7 of said Ordinance No. 6498 to be increased as follows, and not to exceed the following amounts: Business telephones (one party) $4.00 to $5.00 per month; business telephones (two party), $3.50 to $4.00 per month; residence telephones (one party), $2.50 to $2.75 per month; and residence telephones (two party), $2.00 to $2.25 per month; and directed that all other charges should remain as fixed by the tariff on file conforming to the rates prescribed in said Section 7 (R. 273, 279).

On August 5, 1916, the said Public Service Commission in its Cause No. 1825, made and entered an order authorizing certain of the rates prescribed by said Section 7 of Ordinance No. 6498 to be increased as and when by said order directed, not to exceed certain therein specified amounts (R. 223, 249, 256), which said increased amounts and rates were, on the first day of September, 1916, embodied in a tariff filed with the Public Service Commission (R. 280).

The said unchanged franchise rates, and those modified by the above-mentioned orders of December 29, 1911, and August 5, 1916, are less than the rates complained of by the Pacific Company in this case.

In addition to the above-quoted Section 7, providing rates on behalf of the public, the said ordinance and franchise contains certain other covenants,

terms and conditions intended for the benefit of Seattle in its corporate capacity, as distinguished from the interests of the public. Said covenants, terms and conditions constitute a part of the consideration furnished by the franchise holder for the use of Seattle's streets under said franchise. Among these covenants, terms and conditions are provisions requiring that the franchise holder shall from time to time place its telephone equipment and system underground within such areas as may be specified by the City Council, and shall in all cases where excavations are made in public streets restore the same at its own expense to good condition for travel and give bonds for such purpose. It is further provided in said ordinance and franchise that the franchise holder shall hold and save Seattle harmless from, and indemnify it against, any and all damages arising out of the negligence of the franchise holder in respect to its equipment and facilities in the city's streets, and shall, at its own expense, move and remove its wires, facilities and equipment in the public streets from time to time as such moving and removing may be required by reason of the improvement of the city's streets, or the moving of buildings across the same, and shall furnish and maintain certain therein specified free telephones for the use of Seattle in its corporate capacity, and permit Seattle to maintain all wires which it may require for fire alarm or police telephone purposes on all the various poles and any and all the various underground conduits maintained

by the franchise holder. At the time of the hearing before the Special Master in this case the Pacific Company was furnishing free service to Seattle according to the terms of the Independent Franchise (R. 219).

On the 3rd day of May, 1923, and subsequent to the commencement of this suit, the Pacific Company sought to alienate the Independent Franchise, so as to release the property held thereunder from the liabilities and obligations incurred with respect thereto, by executing a purported assignment of said franchise to one F. H. Crosby, of San Francisco, California, without transferring therewith the franchise property (Defendant's Exhibit No. 30). The said Crosby is not the owner, holder or operator of any telephone or telegraph system or equipment in Seattle (R. 213, 219).

By Ordinance No. 2522, passed Dec. 13, 1905, Tacoma granted to Edward E. Webster a franchise to lay and maintain underground conduits, cables and wires and to construct necessary manholes, make house connections and to erect poles and thereon fasten wires in the streets and alleys, and to operate an automatic telephone system and telegraph system and business in the city of Tacoma (R. 153) for a period of twenty-five years. This franchise was duly accepted by Webster, and subsequently by various assignments was transferred to the Pacific Company, and Tacoma, by Ordinance No. 6319 passed February 9, 1916, gave its consent to such transfer to the

Pacific Company and provided that said company should take such franchise subject to all the terms and conditions of said ordinance No. 2522 (R. 165). Section 13 of said Ordinance No. 2522 named maximum rates which might be charged for telephone service in Tacoma (R. 158). This franchise maximum for business telephones was exceeded by the rates which were put in effect by the Postmaster General during the period of Federal control, and which rates the Public Service Commission permitted the Pacific Company to continue in effect in Tacoma by the order of August 8, 1919, hereinafter referred to.

On August 1, 1918, the Postmaster General of the United States took charge of the telephone lines of the Pacific Company and retained control of the same until August 1, 1919; and during such period of Federal control the telephone rates were materially increased in both Seattle and Tacoma. During the period of such Federal control the Public Service Commission on February 13, 1919, made an order establishing the rates fixed by the Postmaster General as the rates of the Pacific Company in the State of Washington and specifically directed that all contracts in conflict with Postmaster General rates be terminated. This order was reviewed by Seattle and Tacoma and it was held by the State Supreme Court that the order was void because the Public Service Commission did not have jurisdiction during the period of Federal control. *State ex rel. Seattle v. Public Service Commission*, 110 Wash. 130; 188 Pac.

7. No order has been made by the Public Service Commission since that time in which it expressly directed a termination of franchise rates.

On or about the eighth day of August, 1919, the Pacific Company filed with the Public Service Commission an application petitioning said Commission to continue in force on less than statutory notice the rates theretofore authorized by the Postmaster General during the period of Federal control. This application was accompanied by a certain letter written by the Pacific Company to said Commission bearing date of August 5, 1919, (R. 201, 284).

On August 8, 1919, the Public Service Commission entered an order *permitting* the Pacific Company to continue to charge the "war rates" prescribed by the Postmaster General (R. 287), which rates would otherwise have become ineffective, under the Congressional resolution terminating Federal control four months from the date of the return of the wires to the owners, to-wit: Four months from August 1, 1919, (R. 286). No statutory complaint was filed, no statutory notice was given, nor was any hearing had or evidence taken upon the so-called petition, nor was a conforming statutory tariff filed. In other words there was not even a pretense of compliance with the mandatory statutory conditions precedent to the entry of a jurisdictional order by the commission.

On March 31, 1923, the Department of Public Works (successor to the Public Service Commission)

entered an order refusing to change the rates continued in effect by said order of August 8, 1919 (R. 49, 69). A few days later this suit was commenced by the Pacific Company, alleging that said rate order promulgated by the Department was confiscatory of its property and consequently in violation of the Federal Constitution. The case was referred to a special master, who concluded that the effect of enforcing the order of March 31, 1923, would be to confiscate the property of the Company and recommended that a permanent injunction be granted restraining the Department from putting such order into effect. Pursuant to Section 266 of the Judicial Code, the case was then heard before a three judge court upon exceptions to the report of the special master. The said court in its decree, filed May 19, 1926, overruled the exceptions to the report of the special master and granted a permanent injunction (R. 193). From said decree this appeal is taken.

ASSIGNMENTS OF ERROR.

This appeal is based upon the following Assignments of Error (R. 196):

I.

The court erred in making and entering the decree of May 19, 1926.

II.

The court erred in overruling defendant's exception No. 33 to the report of the master. Said Exception No. 33 is as follows (R. 173):

"They except to the conclusion of the master (pp. 120, 121; p. 135 printed copy), that the order of the Department of Public Works fixing new rates, terminated instead of amending the franchise rates, for the reason that the same is contrary to law in that it fails to give proper effect to the state statute and assumes jurisdiction for the Federal Court over rates which can only be further modified by the Department of Public Works in the manner provided by statute."

III.

The court erred in overruling defendant's Exception No. 37 to the report of the Master. Said Exception No. 37 is as follows (R. 174):

"They except to the conclusion of the master (p. 126; p. 143 printed copy), that the temporary injunction heretofore granted in this case be made permanent for the reason that the same is contrary to the law and the evidence, for the specific reasons assigned in preceding exceptions."

IV.

The court erred in not finding that the Pacific Company up to and including January 21, 1926, and

ever since the beginning of this action, was operating its exchange in the City of Seattle *under a valid franchise contract* which prescribed a maximum schedule of rates for both business and residence telephones, and which unchanged franchise rates, and those modified by the orders of the defendants and their predecessors in office, were less than the rates prescribed in the schedule attached to the amended and supplemental bill of complaint herein, and, for that reason, the orders of the predecessors in office of the defendants do not deprive the Pacific Company of its property without due process of law, and do not deny to said Pacific Company the equal protection of the law, in violation of its rights under the Fourteenth Amendment to the Constitution of the United States.

V.

The court erred in not finding that the Pacific Company is now, and has been ever since the beginning of this action, operating its exchange in Tacoma under a valid franchise contract which prescribed a maximum schedule of rates for both business and residence telephones and which franchise rates, as modified by the orders of the defendants and their predecessors in office were less than the rates prescribed in the schedule attached to the amended and supplemental bill of complaint herein, and, for that reason, the orders of the predecessors in office of the defendants did not deprive the Pacific Company of its property without due process of law, and did not deny to the Pacific Company the equal pro-

tection of law, in violation of its rights under the Fourteenth Amendment to the Constitution of the United States.

VI.

The court erred in finding that the order of the Department of Public Works, referred to in defendant's Exception No. 33, terminated the franchise contract between the Pacific Company and Seattle, for the reason that said order did not attempt in any manner to change the then existing franchise rates; nor had the commission by compliance with the statute (Rem. Comp. Stat. of Wash., Sec. 10391; 10422; 10423; 10424) acquired jurisdiction so to do.

VII.

The court erred in finding that the order of the Department of Public Works referred to in Defendant's Exception No. 33 terminated the franchise contract between the Pacific Company and Tacoma, for the reason that said order did not attempt in any manner to change the then existing franchise rates; nor had the commission by compliance with the statute, (Rem. Comp. Stat. of Wash., Sec. 10391; 10422; 10423; 10424) acquired jurisdiction so to do.

VIII.

The court erred in holding that Section 10379 of Rem. Comp. Stat. of the State of Washington authorized the defendant's predecessors in office to terminate the franchise contract existing between the Pacific Company and Seattle, because of an alleged construction of said section by the Supreme Court

of the State of Washington in the case of *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107; 205 Pac. 3.

IX.

The court erred in holding that Section 10379, of Remington's Compiled Statutes of the State of Washington, authorized the defendant's predecessors in office to terminate the franchise contract existing between plaintiff and the City of Tacoma because of an alleged construction of said section by the Supreme Court of the State of Washington in the case of *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107; 205 Pac. 3.

X.

The court erred in holding that the alleged construction of said section by the Supreme Court of the State of Washington was binding upon it, and in refusing to exercise an independent judgment in construing said section.

The points intended to be relied upon are set forth at page 293 of the record, there being thirteen such points, all of which may be presented and discussed under a single heading.

ARGUMENT.

THE PACIFIC COMPANY'S LAWFUL MAXIMUM EXCHANGE RATES IN THE CITIES OF SEATTLE AND TACOMA BEING SPECIFIED IN EXISTING FRANCHISE CONTRACTS, THERE IS NO CONFISCATION AS A MATTER OF LAW AND NO CONSTITUTIONAL RIGHT IS INVADED IN REQUIRING THE PACIFIC COMPANY TO OBSERVE AND COMPLY WITH THE SAME, AND, THEREFORE, THE FEDERAL COURT IS WITHOUT JURISDICTION TO INQUIRE INTO SUCH RATES IN RESPECT TO THE CITIES OF SEATTLE AND TACOMA.

The state may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation, and the fact that rates fixed by such contract may become confiscatory does not affect the validity of the agreement.

St. Cloud Public Service Co. v. St. Cloud, 265 U. S. 352; 68 L. Ed. 1050;

Columbus Ry. Power & Light Co. v. City of Columbus, 249 U. S. 399; 63 L. Ed. 669.

The State of Washington has conferred power upon its municipalities to make such contracts. *State ex rel. Ellertsen v. Home Tel. & Tel. Co.*, 102 Wash. 196, 200; 172 Pac. 899. However, by the Public Service Commission law of 1911, provision was made whereby the Public Service Commission might relieve either party to such a contract so far as the contract affected rates or service of the public utility. Section 43 of the Public Service Commission Law, being Section 10379 Rem. Comp. Stat. of Washington,

relates particularly to existing contracts of telephone companies, and is as follows:

"Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line equipment or service under any contract or contracts in force at the date this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: *Provided, however,* that the commission shall have the power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company *as and when directed by such order.*

No effect can be given to the words "*as and when,*" appearing in the above-quoted statute, unless the statute is held to mean that the franchise contract still remains in existence, save as altered and modified by the order of the Commission or Department.

Every word of the above-quoted statute must be given effect, and no single word may be disregarded.

25 R. C. L. 1004;
Lawrence v. Allen, 7 Howard, 785;
Bend v. Hoyt, 13 Peters, 263.
Montclair Township v. Russell, 107 U. S. 147;
Postmaster General of the U. S. v. Early, 12 Wheat. 136.

It will be noted that under the above-quoted statute it is wholly discretionary on the part of the Commission as to whether or not it will change such

franchise contract. If the Commission, or its successor, the Department of Public Works, did not see fit to alter the contract between the Pacific Company and the respective cities, the Company would have had no relief against alleged confiscatory rates. This situation is aptly expressed by the United States Supreme Court in the following language from *Arkansas Gas Co. v. Railroad Comm.*, 261 U. S. 379; 67 L. Ed. 705, 710:

"The question of whether, in the absence of the statute—it being made to appear that the stipulated consideration was grossly inadequate—the commission, under the circumstances disclosed by the record, would have been under a duty to fix gas rates in contravention of the contracts, may be put aside with brief consideration. While a state may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts (Union Goods Co. v. Ga. Pub. Service Corp., 248 U. S. 372, 375; 63 L. Ed. 309, 311; 9 A. L. R. 1420; P. U. R. 1919 C 60; 39 Sup. Ct. Rep. 117; Producers Transportation Co. v. Railroad Comm., 251 U. S. 228, 232; 64 L. Ed. 239, 242; P. U. R. 1920 C 574; 40 Sup. Ct. Rep. 131), there is quite clearly no principle which imposes an obligation to do so merely to relieve a contracting party from the burdens of an improvident undertaking. The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed, the exertion of legislative power solely to that end is precluded by the contract-impairment clause of the Constitution. The power does not exist *per se*. It is the invasion of the public interest which justifies it, and, at the same time, conditions its exercise."

By virtue of Ordinance No. 6498 of Seattle, passed on the twenty-third day of April, 1901, and by virtue of the subsequent assignment to the Pacific Company of the franchise granted by said ordinance, and the ratification of said assignment by the City in its Ordinance No. 7143, there was created a valid franchise contract between the City and the Company. The unchanged franchise rates and those subsequently *modified* by orders of the Commission, are less than the rates of which the Pacific Company complains in this case.

By virtue of Ordinance No. 2522 of the City of Tacoma, passed December 13, 1905, and the subsequent transfer thereof to the Pacific Company and the ratification of such transfer by Ordinance No. 6319, passed February 9, 1916, there was created a valid franchise contract between Tacoma and the Pacific Company. The maximum franchise rates for business telephones within the city of Tacoma in such franchise contract, as subsequently *modified* by orders of the Public Service Commission and the Department of Public Works, are less than the rates of which the Pacific Company complains in this case.

It will be noted that the orders made by the Public Service Commission and its successor, the Department of Public Works, authorizing increases of telephone rates in the cities of Seattle and Tacoma have been purely *permissive*. It is true that the Public Service Commission by its order of February 13, 1919, *attempted* to terminate the Seattle and

Tacoma franchise contracts, but this attempted termination was declared void by the State Supreme Court in the case of *State ex rel. Seattle v. Public Service Commission*, 110 Wash. 130; 188 Pac. 7.

The trial court, in affirming the Report of the Special Master, erroneously held that the order of the Public Service Commission (now Department of Public Works) entered on August 8, 1919, after the termination of Federal control of the properties, terminated the franchise contract between the Pacific Company and the cities of Seattle and Tacoma. Said order of August 8, 1919, however, merely *permits* the Company to continue to charge the "war rates" prescribed by the Postmaster General. The rates permitted to be charged by the order of August 8, 1919, were continued in effect by the order of March 31, 1923, which order is the basis of this suit. Said order of August 8, 1919, made no reference whatsoever to the said franchise rates as previously modified by the order of August 5, 1916. In other words, said order was, as a matter of law, and by its own terms clearly *permissive*. No complaint was filed, as required by statute, nor was a hearing had upon the so-called petition, both of which are conditions precedent, under the Public Service Commission Law, to the exercise of the police power in the matter of termination of contracts. (Rem. Comp. Stat. of Wash., §§ 10379; 10391; 10422; 10423; 10424. See Appendix). In fact no conforming tariff was even filed. This order and the *petition* of the Pacific Company

to have such rates continued in effect, will be found in Exhibit "C" to the Answer to the Amended and Supplemental Complaint (R. 167), and it was stipulated at the hearing that they were correct and that no additional exhibits need be filed (R. 201).

The order of August 8, 1919, even if it purported to terminate the franchise contracts (which it does not), could not under the law effect such a termination. The said order was made without the service of notice, filing and service of a complaint, or the holding of a hearing, as required by statute, and therefore *the Commission had no jurisdiction to terminate such contracts*, and the said order, if construed as attempting to terminate the contracts, *would be illegal, null and void*. The jurisdiction of the Public Service Commission is special and limited, depending on statutory grant, and it must act strictly within the limits of its jurisdiction, otherwise its acts are void. In the case of *Hudson Valley Ry. Co. v. United Transportation Co.*, 217 N. Y. Sup. 614, it appeared that the Public Service Commission of New York made a certain order without notice to certain parties directly affected thereby. The court on page 619 of its decision in said case, states:

"It is true that, by statute, this commission is vested with exclusive original jurisdiction in all matters relating to common carriers. Notwithstanding that, it is a tribunal of special and limited jurisdiction. The nature, extent and exercise of this jurisdiction depend on the statutory grant. It cannot exercise any powers other than those which have been expressly conferred, and its power is not to be ex-

tended by construction or by unnecessary implication. It must act strictly within the limits of its jurisdiction, and any departure therefrom is usurpation of power that imparts no validity whatever to its decree. Lacking jurisdiction, its determination is void to every intent and for every purpose, and should be so declared by any court to which it is presented.

"The exercise of jurisdiction by that body does not raise a presumption of the existence of the requested jurisdictional facts, for nothing is presumed to be within the jurisdiction of such a body, and one who relies on its order or decree, or who claims any right or benefit under its proceedings, must affirmatively show its jurisdiction. * * * The Commission could only acquire jurisdiction of the defendant's application upon compliance by it with the provisions of the statute. That statute requires that it give 'due hearing' upon such an application. To effectuate this provision of law, notice was required to all parties interested who might be affected by the result. * * * The objection to jurisdiction may be raised directly or collaterally whenever and wherever the power of the tribunal making the decree is brought in question. * * * This court should not hesitate to condemn and annul a determination of the commission whenever it has pronounced a judgment without power. Public policy neither requires nor justifies any other result."

See also:

Re Milwaukee, P. U. R. 1927B 229.

The previous orders affecting the Seattle franchise rates were *permissive* in form and did not affect *all* of the franchise rates. The order in Cause No. 31 of the Public Service Commission (R. 273), dated September 29, 1911, enumerated a few of the franchise rates which were expressly permitted to be raised and directed the maintenance of the *status quo*

as to the balance. The order in Public Service Commission Case No. 1825 (R. 249), dated August 5, 1916, permitted the cancellation of certain obsolete rates only and directed the maintenance of the *status quo* as to the balance. The so-called obsolete rates relate to a type of service no longer furnished and need not concern us further.

We have, therefore, this situation, to-wit: That prior to August 8, 1919, the Company had been *permitted* to raise, not in excess of the amount specified, a portion only of the franchise rates in both Seattle and Tacoma, the balance still remaining in full force and effect.

In the order under attack in this case, made by the Department of Public Works on March 31, 1923, the Department refused to change the rates continued in effect by said order of August 8, 1919. The legal effect of the order of August 8, 1919, was to *permit* the *modification* of the franchise rates in the same manner as if specific words to that effect had been inserted in the order.

> *State ex rel. Spokane v. Kaykendall*, 119 Wash. 107, 112; 205 Pac. 3.

The Supreme Court of Washington has had many occasions to consider the power of a Public Service Commission with respect to franchise contracts, and there have been numerous decisions with reference thereto, beginning with *State ex rel. Webster v. Superior Court*, 67 Wash. 37; 120 Pac. 861, and ending with *Monroe Water Co. v. Monroe*,

135 Wash. 355; 237 Pac. 996. An examination of these decisions will show that the Department of Public Works has no power to abrogate or even modify franchise provisions dealing with *general franchise matters*, but that it does have power to abrogate franchise provisions dealing with *rates or service* designed in behalf of the general public.

Since the Department cannot abrogate *all* franchise provisions, it is evidence that its authority is limited to *amending* the franchise contract, and that one set of rates is substituted for another and the contract as modified continues as a binding agreement, and this court does not have authority to further modify such contract.

The Supreme Court of Washington, in construing the Department's jurisdiction over franchise contracts, has considered it as a power to amend or modify the contract.

In *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 42, 57; 120 Pac. 861, it is said that the question there presented is whether the franchise rates "may be *altered* or annulled by the state under its reserve powers."

In *State ex rel. Tacoma Ry. & Power Co. v. Public Service Comm.*, 101 Wash. 601, 604; 172 Pac. 890, the court states that the question is,

> " • • • whether the public service commission is authorized by the statute to *relieve* from the franchise provisions complained of when the income of the company is not sufficient to pay a reasonable rate upon the value of the property devoted to the

public service and provide an adequate and sufficient service."

In *State ex rel. Ellertsen v. Home Tel. & Tel. Co.*, 102 Wash. 196, 202; 172 Pac. 899, the Court says:

"The appellant and the City of Spokane having agreed upon the terms under which the appellant was allowed to operate, thereby entered into a contract which each of them have authority to make, and good faith and fair dealing will not permit the appellant to occupy the streets of Spokane by virtue of its franchise, and, at the same time, refuse to comply with the conditions thereof. It received from the city what it, at the time, deemed adequate consideration for its contract, and as long as it retains that consideration it must, in receipt therefor, perform the service at the price agreed upon, *except as it may be relieved* of those terms and conditions by the operation of the public service commission law."

See also:

Monroe Water Co. v. Monroe, 135 Wash. 355; 237 Pac. 996.

It is respectfully submitted, therefore, that it being a matter of discretion on the part of the Department of Public Works, or its predecessor, the Public Service Commission, to relieve the plaintiff from burdensome franchise provisions, and that discretion having been *in part* exercised and the plaintiff authorized to charge *some rates* in excess of those specified in the franchise, the franchise contract as amended by this discretionary act continues as a binding obligation, subject to further change only by a further exercise of discretion by the state regulatory body. Even though the rate authorized by

such exercise of discretion may have become confiscatory, that fact would not confer jurisdiction on this court, but the franchise contract is still in full force as between the parties and cannot be altered or abrogated by the Federal Court.

The abrogation of a contract is a valid exercise of the police power or it is a nullity. It is not for the Company or the court to say how far the *police power should have been exercised* in the matter of terminating the Pacific Company's franchise rates. It is for the state, through its legislative or other public authorities by the legislature thereunto authorized, to determine *when and to what extent* the public welfare requires the assertion of the police power.

Freeport v. Nassau & Suffolk Ltg. Co., 181 N. Y. Sup. 830, 832;

Warsaw v. Pavillion Natural Gas Co., 182 N. Y. Sup. 73, 75;

Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U. S. 372; 63 L. Ed. 309;

State ex rel. Bissinger & Co. v. Hines, 186 Pac. (Ore.) 420;

Ohio & Colorado Smelting & R. Co. v. Public Utility Com., 187 Pac. (Col.) 1082, 1085;

Ohio & M. Ry. Co. v. Todd, 15 S. W. (Ky.) 56;

State v. Crawford, 2 A. L. R. (Kan.) 880.

The abrogation of a contract under the police power is justifiable only when done, not for the convenience or benefit of an individual or corporation, but for the promotion of a public welfare.

City of Superior v. Douglas County Tel. Co., 122 N. W. (Wis.) 1023, 1026;

Walla Walla v. Walla Walla Water Co., 172 U. S. 1; 43 L. Ed. 341, 346;

Columbus Ry. P. & L. Co. v. Columbus, 249 U. S. 399; 63 L. Ed. 669, 676, 677;

Warsaw v. Pavillion Natural Gas Co., 182 N. Y. Sup. 73, 75;

Freeport v. Nassau & Suffolk Ltg. Co., 181 N. Y. Sup. 830, 832;

Reed v. Anoka, 88 N. W. (Minn.) 981, 982;

Omaha Water Co. v. Omaha, 147 Fed. 1; 8 Ann. Cas. 614;

Detroit v. Detroit Citizens' Street Ry. Co., 184 U. S. 368; 46 L. Ed. 592, 602;

Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U. S. 372; 63 L. Ed. 309;

Winfield v. Public Serv. Co., 118 N. E. (Ind.) 531, 533.

In the case last above cited it is said, at page 533:

"Such contracts are binding and mutually enforceable, and unless the public welfare requires, the legislature cannot impair the obligation thereof."

There is no contention in this case, nor was there any contention in any of the public service commission cases above referred to, that the public welfare required the termination of any or all of the franchise rates or the partial modification of any of them. Of course, the findings and order of the Public Service Commission, in so far as they purport to be exercises of the police power, must be founded upon a hearing at which evidence is taken, since the direct exercise of the police power without a hearing is a

purely legislative function which cannot be delegated to an administrative body.

It is clear, therefore, that all of said orders of the Public Service Commission must be regarded not as exercises of the police power, but as *permissive* raises in rates consented to by the state as principal in respect to a contract made by its agent, the City. Unless considered in this light, said orders are repugnant, not only to the Fourteenth Amendment, but to the "impairment" clause of the Federal Constitution. In other words, a contract may be terminated or modified in whole or in part by consent of the parties or by the exercise of the police power. To be sustainable as an exercise of the police power the *public* peace, health and welfare must be involved, but *consent* by the state is another matter. This is a mere permissive modification of the contract. There is much confusion in the decisions of the courts by reason of the failure to recognize the distinction between *modification by consent* and *termination under the police power*. This confusion is very obvious in the case of *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861.

As was said in the case of *City of Sapulpa v. Oklahoma Natural Gas Co.*, 192 Pac. 224, 225:

"The great weight of authority is to the effect that, while a municipality may, in the absence of any direct action by the state, enter into a contract with a public utility, whereby the rates to be charged by the latter are fixed, and such contract, as between the parties themselves, is binding, nevertheless the state

has power, which it may delegate to an administrative body, such as a public service commission, to increase such rates, when because of increased costs, or any other reason, such rates are no longer reasonable. In other words, franchise rate contracts are not such contracts as may not be increased by the state, without infringing the constitutional guaranty.

"This rule apparently has not been expressly repudiated in any jurisdiction except Ohio and Virginia, where, as is shown above, the cities have been given express and definite power to make inviolable contracts as to rates.

"In general terms it may be said that these decisions rest on two general grounds: First, franchise contracts must be deemed to have been entered into with knowledge of the inherent and reserved power of the state to alter such contracts, when necessary so to do for the public welfare; second, municipalities being merely agents of the state, the state may, at any time, waive the rights of the municipality in the contract.

"*Not every case which passes upon the question makes the distinction* between these two grounds, and frequently both reasons are given for the decision. The attempt has been made, however, to separate the decisions, according as they lay the greater emphasis upon the one or the other of the two doctrines."

Consent of the state, as principal, over the protest of the agent city, is not a unique proposition. In the case of *Winfield v. Court of Industrial Relations*, P. U. R. 1922E 791, 794, 207 Pac. 813, in commenting upon this question, the court said:

"It has also been declared many times that when the state authorizes one of its municipal corporations to make a contract with private parties or public service corporations for a reasonable term of years, the state cannot by subsequent legislation impair that contract to the prejudice of the party with whom the

contract was made nor without the assent of such party thereto. The many cases declaring this principle are the ones here pressed upon our attention by counsel for the city. But these cases do not reach the matter here concerned. Here the state authorized its own subordinate governmental agency, the city of Winfield, to make a contract with Pattison and his assignees. Now the state by further legislation says in effect:

"'I resume this power and confer it upon another governmental agent, a Public Utilities Commission or an industrial Court, and I authorize it to act for me instead of my municipal corporation at Winfield.'

"When the city of Winfield made that contract with Pattison it was acting as the agent of the state for the benefit of the people of that municipality. Until the Public Utilities Law was enacted, the city and Pattison might have amicably changed that contract. In the act of 1911 (Laws 1911, ch. 238), the state put forward another agent clothed with power to deal with Pattison; and that agent of the state, with the express or implied consent of Pattison's present assignee has abrogated and changed certain features of that contract; and neither the Federal inhibition concerning the sanctity of contracts nor any other constitutional principle is violated thereby."

In the case of *Central Union Telephone Co. v. Indianapolis Telephone Co.*, 126 N. E. 628, 633, the court said:

"When a state, either directly or through the action of a municipality having express delegated authority so to do, has agreed to relinquish its right to exercise its regulatory power as to rates, or as to other matters prescribed by the contract, such agreement is reciprocal and binding only as between the parties to the agreement. Neither party to the contract can change it without the consent of the other;

but the parties to such a contract may agree by mutual consent to change the contract or to release each other entirely from the obligations of the contract. *Winfield v. Public Service Commission*, 118 N. E. 531. In making the contract the state, or the city, as the case may be, represents the public as against the person or corporation with which the contract is made; and, in agreeing to a change of the contract or to its complete rescission, the city, or the state, as the case may be, acts for the public and binds it as effectively in the one case as in the other."

In the case of *Borough of North Wildwood et al. v. Board of Public Utility Commissioners et al.*, 95 Atl. 749, P. U. R. 1916B 77, 78, appears the following statement:

"This, however, does not help the prosecutors; for, while the municipality itself has not assented to a change in rate, the state, its creator and parent, has done so through a specially constituted agency. If the water company were here complaining that its contract rights were being impaired, a different question would be presented; but the contract right of one of the state's creatures may be waived by the creator."

In the case of *Board of Survey v. Bay State St. Ry. Co.*, 113 N. E. 273, 274, the court said:

"In granting locations for street railways, boards of selectmen and boards of aldermen are public officers and not agents of their respective towns and cities. The state exerts its sovereign power through them as its instruments. *Flood v. Leahy*, 183 Mass. 232, 66 N. E. 787. The Legislature has the power, so far as concerns these public officers and the municipalities by whom they were elected, to change or abrogate the terms of such locations."

Also, in the case of *Portland v. Public Service Commission*, 173 Pac. 1178, P. U. R. 1919A 127, 134,

the Supreme Court of Oregon laid down the following rule:

"On the basis of contract the situation then presented is this: The state, acting by and in the name of its agents, the city, made an agreement with the company. It later created the Public Service Commission, giving it general authority over all such and kindred matters everywhere in Oregon, except as stated. By this legislation there came into existence a new representative of the state, endowed by it with plenary power, and to which the other party to the so-called agreement applied for a modification thereof. After investigation and deliberation, which may be likened to negotiations between contracting parties, the state, by its agent, the Commission, has consented to a change in the contract, allowing the company to charge an increased rate of fare. Whatever might be said if one of the parties to the contract, without the consent of the other, should attempt to change it, whether by legislation impairing the obligation of the contract or otherwise, it does not apply to the present situation; for, as stated, the contracting parties have themselves agreed to the change."

Again, in the case of *Robertson v. Wilmington & P. T. Co.*, 104 Atl. 839, P. U. R. 1919B 129, 137, the court said, at page 137:

"It clearly appears from the authorities that the fixing of rates to be charged by public service corporations is a governmental function, and that it can be conferred by the legislature on a state agency, such as a municipality or public utility commission; that when the rate has been fixed by statute it cannot be changed by one party without the consent of the other, if the grant of the right clearly and unmistakably constitutes a contract between the parties; if it was not a contract, but a mere regulation, prohibition, or condition of franchise, the state may,

under its police power, which is an attribute of sovereignty, regulate or alter the rate that had been fixed by statute, municipal ordinance, or commission's order.

"Applying to the present case the text contained in the opinion of Justice Day above quoted, was the fixing by statute of a maximum rate of 5 cents a renunciation of the sovereign right to fix rates evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction? Was it clearly a contract between the state and the companies, or merely the condition of a power or franchise granted? When the legislature said the companies should not charge a rate exceeding 5 cents, there was, of course, an implied agreement that they should have a right to charge that much; but was it in fact anything more than a prohibition against charging a higher fare? It is true that, when the companies accepted the provisions of the statute that fixed the maximum rate, they impliedly agreed not to charge more than such rate; but was the language employed such as to evidence unequivocally an agreement that the state had renounced the right to fix a different rate?"

And again, on page 138, the court said:

"But this is not a case where the state, through the agency of the Utility Board, is endeavoring to reduce the fare below the sum which it had agreed might be charged, or to limit the right or power that had been given to the company, as in the Bowers case. Neither is it a case where the company, upon its own motion, had charged more than 5 cents, which it had agreed not to exceed. It is a case where the state, which had fixed a maximum rate of 5 cents, agrees, through an agency it had created, that the companies may charge a higher rate, the other party to the contract consenting thereto. So that even though there was a contract binding on the parties that made it, it was possible for them to change it if it was right and proper to do so."

In the case of *State ex rel. Indianapolis Traction & Terminal Co. v. Lewis et al.*, 120 N. E. (Ind.) 129; P. U. R. 1918F 111, at pages 115, 116, the court makes the following comment:

"The doctrine is elementary, that legislative action, if possible, should be so construed as to give effect and meaning to all its provisions. The 1913 Public Utility Law introduced a new departure in the handling of public utilities, and was effective to withdraw from the municipalities certain powers theretofore exercised by them. The purpose of this law was, in part, to correct through an unprejudiced tribunal certain unfair action against the people by the utility, or by the people against the utility, and, in so far as possible, fix a uniform procedure throughout the state for all concerned. At the time this law was passed the legislature knew that all public utilities of the state were using the streets and public thoroughfares of cities and incorporated towns, as well as other public highways, by consent of the state directly given, or through its regular constituted representatives. It also knew that as to all these utilities operating under an unexpired franchise or contract, it was inhibited by the Federal Constitution, Article 1, Sec. 10, from passing any law impairing these obligations."

The company at one time, as assignee, owned two *blanket* franchises in Seattle, the Sunset and Independent Franchises. Each of these blanket franchises authorized service *throughout the city* and the placing of quipment in *all of the city streets*. Being co-existing written contracts, they would have to be read together during such time as both were valid and subsisting agreements, and effect given to the provisions of each in so far as the earlier Sunset

Franchise was not in conflict with and superseded by the later Independent Franchise. *Cleveland C. Ry. v. Cleveland,* 94 Fed. 385. Two co-existing franchises must be so construed together.

Borough of North Wildwood v. Board of Pub. Utl. Comm., 95 Atl. 749;

Cleveland C. Ry. Co. v. Cleveland, 94 Fed. 385;

City of Philadelphia v. R. A. P. Ry. Co., 22 Atl. (Pa.) 695;

City of Shreveport v. S. W. G. & E. Co., 258 Fed. 59;

Borough of Easton v. Lehigh Water Co., 97 Pa. St. 554;

State ex rel. Bridgeton v. B. & N. T. Co., 45 L. R. A. 837;

Mahan v. Michigan Tel. Co., 93 N. W. (Mich.) 629;

The foregoing principle is but a statement of the general rule of contract laid down by all of the authorities, and aptly stated by Page in his work, "Page on the Law of Contracts" (2nd ed.), Sections 2490 to 2494, inclusive.

The Company seems to be committed to the peculiar theory that in Seattle it could be the owner of, and operate under, two separate blanket franchises of city-wide application, and be bound only by one or the other franchise as it saw fit; and that it could exclude itself from the operation of one of the franchises by purporting to take out permits under the other, even though some of the property placed in the street under such permits might be joined to and commingled with property confessedly placed in the

street under the other franchise. We submit that while the two franchises were in existence *both* must be looked to in order to measure the company's responsibilities. We further submit that commingled property, regardless of the character of the permit authorizing installation, is referable to the basic franchises (or the remaining franchise after one has expired) as the authority for its location in the streets. *Illinois Trust & S. Bk. v. Arkansas City W. Co.*, 67 Fed. 196.

It is the contention of the Pacific Company that it is now operating in the city of Seattle and using the streets of said city without being burdened with or subject to any franchise obligation. It admits that it was operating at one time under two franchises, the "Sunset Franchise" and the "Independent Franchise." It is further admitted that the "Sunset Franchise" has expired. It claims that by reason of a purported assignment of the Independent Franchise to one F. H. Crosby, of San Francisco, that it, the Pacific Company, is relieved of any of the conditions or obligations therein imposed.

The appellants contend that the company, in order to use the streets legally, must now operate under the unexpired "Independent Franchise," and that the purported assignment to F. H. Crosby of the Independent Franchise does not relieve the company from the obligations and conditions imposed therein, particularly as to the maximum rates speci-

fied therein as modified by the Public Service Commission of the State of Washington.

The Pacific Company in making this purported assignment to F. H. Crosby, has done so for the purpose of relieving itself, as grantor, from the liabilities contracted or incurred in the operation, use or enjoyment of such franchise and of its privileges. The property of the "Independent Company" and the "Sunset Company" were commingled. Each of said companies had a common grant to use each and all of the streets of the City of Seattle for telephone and telegraph purposes. In the inventory of the property of the Pacific Company made in 1913, which was introduced in evidence in this case, the property of the Independent Company was included, and the Pacific Company has received a return on the valuation of the combined properties of both companies. No attempt has been made by F. H. Crosby, the assignee of said franchise, to conduct, maintain or operate within the limits of the City of Seattle, a telephone or telegraph system. The company retains the benefits but attempts to repudiate its obligations thereunder.

Section 8 of Article XII of the Washington State Constitution, provides that:

"No corporation shall lease or alienate any franchise, so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges."

The Supreme Court of the State of Washington has construed this provision of the State Constitution in the case of *State ex rel. Tacoma v. Sunset Tel. & Tel. Co.*, 86 Wash. 309, 322, 150 Pac. 427, as follows:

"It must, therefore, be considered that all parties dealt with the subject-matter with full consideration of the existing law, and that such duties and privileges as the law expressed were portions of the contracts and transactions. The law authorizing the judicial sale of property and franchise was part of the contract. The constitutional provision making the franchise and property subject to all liabilities under the franchise also entered into the entire series of transactions and follows and binds even the purchaser at judicial sale, for it must be held to purchase with full knowledge and understanding of all legal conditions attaching under the paramount law to the franchise. The purchaser even at judicial sale of a public franchise cannot enjoy the easements and other privileges without assuming the burdens attached."

Again, in the case of *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55, at page 64, the court in commenting upon the obligation of a corporation in reference to its franchise, said as follows:

"A corporation cannot, without the assent of the Legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special

charter from the Legislature, and to those formed by articles of association under general laws."

It was said, in the case of *Thomas v. West Jersey Railroad Company*, 101 U. S. 38; 25 L. Ed. 950, at page 952, as follows:

"That principle is, that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in the case of *R. R. Co. v. Williams*, 17 How. 30, 15 L. ed. 27."

In the case of *The York and Maryland Line Ry. Co. v. Winans*, 17 How. 31; 15 L. Ed. 27, at pages 29 and 30, the court said as follows:

"The plaintiff complains here of this charge, for that the cars employed were not built by, and did not belong to the Company; that they were the exclusive property of the Maryland Corporation; and that the agreement to divide the profits did not constitute a partnership, nor evince a relation of principal or agent to impose a liability. This conclusion implies, that the duties imposed upon the plaintiff by the charter, are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision it may avoid further responsibility. But those acts involve an overturn of the relations which the Charter has arranged between the Corporation and the community. Import-

ant franchises were conferred upon the Corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and incorporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The Corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature. *Beman v. Rufford*, 1 Simon, N. S. 550; *Winch v. B. & L. Railway Co.*, 13 L. & E. 506."

In the case of *Georgia Railroad & Banking Co. v. Haas*, 56 S. E. 313, it was held that if a railroad company makes a lease to, or licenses another to exercise its franchises, in whole or in part, without express legislative authority, it remains liable for the acts of the lessee or licensee in such operation.

In construing a constitutional provision of Utah, which is as follows:

"No corporation shall lease or alienate any franchise, so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges,"

the court said, in the case of *Cooper v. Utah etc. Ry. Co.*, 102 Pac. 202; 136 Am. St. Rep. 1075, at pp. 1086 and 1087, as follows:

"So construing the constitution, we are of the opinion that its provisions restricted the alienation of the franchise held by the Utah Light and Power Company, and which were granted by the municipality, to occupy and use the streets and public places so as to relieve such franchises, or any property held thereunder—property which was necessarily held and used in the operation, use, or enjoyment of the

rights and privileges conferred by such franchises, and which property was necessary to successfully operate, use, or enjoy such rights or privileges—from the liabilities of such company contracted or incurred in operation, etc. Such holding not only includes such franchises, but also the poles and wires erected and maintained in the streets and public places of the city, for such property was necessary to the use and enjoyment of the rights and privileges granted by the municipality, and without which such rights and privileges could not successfully have been exercised and enjoyed."

The inconsistent attitude of the Company in continuing to occupy the streets while pretending to have assigned its franchise brings it squarely within the condemnation of our own Supreme Court.

In the case of *State ex rel. Ellertsen v. Home Tel. & Tel. Co.*, 102 Wash. 196, 202, 172 Pac. 899, the court said:

"The appellant and the City of Spokane having agreed upon the terms under which the appellant was allowed to operate, thereby entered into a contract which each of them had authority to make, and *good faith and fair dealing will not permit the appellant to occupy the streets* of Spokane by virtue of its franchise, *and, at the same time, refuse to comply with the conditions thereof.* It received from the city what it, at the time, deemed adequate consideration for its contract, and *as long as it retains that consideration it must, in receipt therefor, perform the service*, at the price agreed upon, except as it may be relieved of those terms and conditions by the operation of the public commission law."

An illuminating discussion, by the Supreme Court of Appeals of Virginia, of the power of a pub-

lic service commission with respect to changing franchise rates, will be found in,

Town of Victoria v. Victoria Ice, Light & Power Co., 114 S. E. 92;

City of Portsmouth v. Virginia Ry. & Power Co., 126 S. E. 362.

CONCLUSION.

In conclusion, we submit that by virtue of the existence of valid franchise contracts between the Pacific Company and the Cities of Seattle and Tacoma at the commencement of this litigation, and at the time of trial, which contracts, as amended by the Department of Public Works or its predecessor, were binding upon the Company, no question of confiscation is presented by this record, no Federal question arises and the Federal Court is without jurisdiction.

We, therefore, respectfully submit that the decree of the United States District Court, for the Western District of Washington, Southern Division, entered May 19, 1926, was erroneous; that said decree should be reversed and the case dismissed.

Respectfully submitted,

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APPENDIX

SECTION 10379 OF REMINGTON'S COMPILED STATUTES (1922) OF WASHINGTON.

EXISTING CONTRACTS—EFFECT.

Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: *Provided, however,* That the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order.

SECTION 10391 OF REMINGTON'S COMPILED STATUTES (1922) OF WASHINGTON.

COMMISSION TO FIX CHARGES AND SERVICE OF TELEPHONE AND TELEGRAPH COMPANIES.

Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any telegraph company or telephone company for the transmission of messages by telegraph or telephone, or for the rental

or use of any telegraph line, telephone line or any telegraph instrument, wire, appliance, apparatus or device or any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance or device, or any telephone extension or extension system, or that the rules, regulations or practices of any telegraph company or telephone company affecting such rates, charges, tolls, rentals or service are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of law, or that such rates, charges, tolls or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force, and fix the same by order as hereinafter provided.

Whenever the commission shall find, after such hearing that the rules, regulations or practices of any telegraph company or telephone company are unjust or unreasonable, or that the equipment, facilities or service of any telegraph company or telephone company is inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities and service to be thereafter installed, observed and used, and fix the same by order or rule as hereinafter provided.

SECTION 10422 OF REMINGTON'S COMPILED STATUTES (1922) OF WASHINGTON.

COMPLAINTS.

Complaint may be made by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission: *Provided,* That no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any gas company, electrical company, water company, or telephone company, unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such gas, electricity, water or telephone service: *Provided, further,* That when two or more public service corporations (meaning to exclude municipal and other public corporations) are engaged in competition in any locality or localities in the state, either may make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unremunerative,

discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint or upon complaint of the commission upon its own motion, the commission shall have power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent oppression, or monopoly or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state.

All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of complaints or grievances or misjoinder of parties; and in any review of the courts of orders of the commission the same rule shall apply and pertain with regard to the joinder of complaints and parties as herein provided: *Provided*, All grievances to be inquired into shall be plainly set forth in the com-

plaint. No complaint shall be dismissed because of the absence of direct damage to the complainant.

Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a notice fixing the time when and place where a hearing will be had upon such complaint. The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint, excepting as herein provided. Rules of practice and procedure not otherwise provided for in this act may be prescribed by the commission.

SECTION 10423 OF REMINGTON'S COMPILED STATUTES (1922) OF WASHINGTON.

Hearings, Orders and Record.

At the time fixed for the hearing mentioned in the preceding section, the complainant and the person or corporation complained of shall be entitled to be heard and introduce such evidence as he or it may desire. The commission shall issue process to enforce the attendance of all necessary witnesses. At the conclusion of such hearing the commission shall make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. A copy of such order, certified under the seal of the commission, shall be served upon the person or corporation complained of, or his or its attorney, which order shall, of its own force, take effect and become operative twenty days after the service

thereof, except as otherwise provided. Where an order cannot, in the judgment of the commission, be complied with within twenty days, the commission may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. A full and complete record of all proceedings had before the commission, or any member thereof, on any formal hearing had, and all testimony shall be taken down by a stenographer appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order of the commission, a transcript of such testimony, together with all exhibits introduced, and of the record and proceedings in the cause, shall constitute the record of the commission.

SECTION 10424 OF REMINGTON'S COMPILED STATUTES (1922) OF WASHINGTON.

INCREASE IN RATES—SUSPENSION—BURDEN OF PROOF.

Whenever any public service company shall file with the commission any schedule, classification, rule or regulation, the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the commission shall have power, either upon its own motion or upon complaint, upon notice, to enter upon a hearing concerning such proposed increase and the reasonableness and justice thereof, and pending such hearing and the decision thereon the commission may suspend the operation of such rate, fare, charge,

rental or toll for a period of ninety (90) days from the time the same would otherwise go into effect, and after a full hearing the commission may make such order in reference thereto as would be provided in a hearing initiated after the same had become effective: *Provided*, That if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding sixty (60) days.

At any hearing involving any change in any schedule, classification, rule or regulation the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the burden of proof to show that the changed schedule, classification, rule, or regulation, or the increased or proposed increased rate, fare, charge, rental or toll, is just and reasonable shall be upon the public service company.

The commission shall give to the hearing and decision of such questions preference over all other questions pending before it and shall decide the same as speedily as possible.

If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or, if appealed to the supreme court, by such supreme court.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927

No. 150.

JOHN C. DENNEY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellants,*

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Respondent.*

APPEAL FROM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

APPELLANTS' REPLY BRIEF

JOHN H. DUNBAR,
Attorney General of the State of Washington,
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Solicitors for Appellants.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927

No. 150.

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vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Respondent.*

APPEAL FROM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

APPELLANTS' REPLY BRIEF

The appellants raise but one question in this court, namely, the franchise relations between the respondent, The Pacific Telephone and Telegraph Company, and the cities of Seattle and Tacoma.

Throughout this brief respondent, The Pacific Telephone and Telegraph Company will be referred to as the "Pacific Company," the City of Seattle will be referred to as "Seattle," and the City of Tacoma, as "Tacoma."

Respondent has not disputed appellants' contention that the state may authorize a municipal corporation to establish by an inviolable contract, the rates to be charged by public service corporations, nor the contention that the validity of such an agreement is not affected by the fact that the contract rates have become confiscatory. Neither does it dispute appellants' contention that respondent, at the time of the commencement of this suit, was operating in Seattle under the franchise granted by Ordinance No. 6498, commonly known as the "Independent Franchise."

The District Court held that the *purported* order of the Public Service Commission entered August 8, 1919, following the termination of Federal wire control, pretending to continue in effect the rates established by the Postmaster General, and the Commission's order of March 31, 1923, suspending the schedule of rates filed by the Pacific Company, had the effect of terminating and abrogating the franchise rates, and making the Postmaster General's rates "statutory" rates, as distinguished from "franchise" or "contract" rates.

In this we think the District Court was in error. The order of August 8, 1919, was based upon the Pacific Company's informal request that the Postmaster

General's rates be continued in effect and asking a waiver of the thirty days' statutory notice. Said request was filed on the 8th day of August, 1919, and on the same day the Public Service Commission, without the statutory prerequisites of the filing of a tariff, service of notice or conducting a hearing, entered the following *ex parte* pretended order:

"The Commission having considered the foregoing application,

"It is Ordered, that leave be granted petitioner to continue in effect the rates, rules and regulations above named, effective August 1, 1919, until further ordered by the Commission." (R. p. 168.)

The order of March 31, 1923, in so far as it relates to rates, reads as follows:

"Wherefore it is Ordered:

"1. That the applications of respondents for increased rates be and the same are hereby denied. That the proposed increased rates in their entirety be and they are hereby permanently suspended; that the same shall not become effective, and *existing rates* shall remain in effect until the further order of the department." (R. p. 69.)

The District Court assumed that the reference to *"existing rates,"* continued in effect by said order, had to do with the rates established by the Postmaster General during the period of Federal control, when the State Public Service Commission had no jurisdiction over the subject matter. *State ex rel. Seattle v. Public Service Commission*, 110 Wash. 30, 188 Pac. 7. But the expression "existing rates" must refer to the *legally effective rates* at that time, not illegal exactions. Clearly the promulgation of the

Postmaster General's rates did not have the effect of terminating the franchise. These rates were terminated by the Congressional act repealing wire control, effective December 1, 1919 (41 Stat. L. 157). The subsequent Commission order of August 8, 1919, authorizing the Postmaster General's rates to be continued in effect having been entered without jurisdiction was ineffective as an exercise of the police power and therefore permissive only if effective for any purpose whatever. Neither the order of August 8, 1919, nor that of March 31, 1923, directly or indirectly purported to terminate the franchise rate provisions.

Respondent contends that the Supreme Court of the State of Washington in *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107, 205 Pac. 3, held that when the department by order prescribes telephone rates, the rate provisions of numerous franchises are *ipso facto* terminated, and the rates so fixed by order of the department become department or statutory rates, as distinguished from franchise or contract rates; that their character as being confiscatory or not must be tested by the general and familiar principles of law applicable to rate regulation, and if such rates are confiscatory in their effect, they are void.

That is not the holding of the *Kuykendall* case. There is no language in that decision which supports respondent's contention. The Supreme Court of Washington did not hold that the rates fixed by the department were distinguishable in character from

franchise rates, nor that the Department having once granted an increase in rates, the franchise contract was itself terminated. All that it holds is that when the Department *after hearing* has fixed rates higher than the franchise rates, the latter are terminated, and the franchise contract is, to that extent, modified.

It is apparent from other decisions of the Supreme Court of the State of Washington that the Department of Public Works has no power to *terminate* franchise contracts or franchise provisions, but that its power is limited to modifying franchise provisions with reference to rates and service.

In *State ex rel. Tacoma R. & P. Co. v. Public Service Comm.*, 101 Wash. 601, 172 Pac. 890, the court said (page 607):

"The right to deal with the question of rates and service is an entirely different matter from the right to grant franchises or abrogate the provisions thereof. The franchises in question having been granted under the clear and express authority of the statute enacted long prior to the public service commission law, it seems plain that it was not the intent of the latter law to grant power to the commission to abrogate franchise provisions. Had the legislature desired to confer this power upon the commission it would have been easy to have said so in such language as would have made the intent plain."

Again, in *Seattle v. Puget Sound T. L. & P. Co.*, 103 Wash. 41, 174 Pac. 464, the court said (page 46):

"If the law confers power upon the public service commission to modify or abrogate franchise provisions, it must be found in Laws 1911, p. 571, Section 53 (Rem. Code, Sec. 8626-53), which confers upon the commission the power to deal with the ques-

tions of safety, efficiency, rates and quality of service. There is nothing in this section which, either expressly or by necessary implication, confers power upon the public service commission to deal with the question of franchise or to modify or abrogate any of the terms or conditions that may have previously been imposed therein. The law will be searched in vain for any provision which confers such power upon the public service commission with reference to such a public utility as that before us."

In *Monroe Water Company v. Monroe*, 135 Wash. 355, 237 Pac. 996, the court said (page 358):

"* * * there was power conferred upon the commission to deal with questions of safety, efficiency, rates and quality of service, but none, either expressly or by necessary implication, to deal with the questions of franchises, or to modify any of the terms or conditions that may have been previously imposed."

Franchise rates may be modified by the state, either through the exercise of its police power, or by consent, the latter method being based on the theory that the city is an agent of the state, and the state can consent to a modification of its agent's contract. In either event, action by the state is necessary. In this case, not only is consent or action by the state lacking, but the state, through its Department of Public Works, has refused to increase the rates either by the exercise of its police power or by consent to a modification of the contract.

Respondent concedes that if the original franchise rates were now in force, the refusal of the department to increase them would be final, and it

would have no recourse to the courts, either state or Federal. Its contention here, however, is that while the original franchise rates could not, in law, be confiscatory, because agreed to by the company, higher rates *permitted* by the commission or department could be confiscatory and subject to compulsory increase at the hands of the courts. In other words, respondent's contention is that if the state has never exercised its police power to modify rates, it cannot be compelled to do so, but once it has exercised that power, it can thereafter be compelled to further exercise it. Carried to its logical conclusion, respondent's theory is that once the police power is exercised by the legislative branch of the state, (the only branch of the state government in which that power is vested), the legislature is immediately divested of that power, and its exercise is transferred to the judicial department. Such a position is untenable and we have not been cited to a case so holding.

In the cases relied upon by respondent the state had modified rates by the exercise of its police power and there was no attempt to compel the state to exercise its discretion in a particular manner. The decisions merely uphold the right of the state, by the exercise of its police power, to modify franchise rates. In the case at bar, the state has exercised its discretion by refusing to modify the rates, and respondent seeks to compel it, not to exercise its discretion, but to exercise its police power in a particular manner, and this it cannot do.

Respondent contends that the construction of a state statute by the court of last resort of the state is binding upon this court. With this contention we disagree. Where questions of contract rights and Federal questions are involved, Federal courts must decide such questions for themselves.

Pleasant Township v. Aetna Life Ins. Co., 138 U. S. 67;

Louisville Trust Co. v. Cincinnati, 76 Fed. 296.

In any event, where the state Supreme Court has not passed squarely upon the question involved, this court is not bound by any purported construction placed upon such statute. It is clear from a reading of *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107, 205 Pac. 3, that the state Supreme Court has never held that franchise rates, increased by order of the Department of Public Works, become department or statutory rates, as distinguished from franchise or contract rates, nor that if such rates are confiscatory in their effect, they are void.

In view of the fact that the state court has not passed upon this question, this court is at liberty to place its own interpretation upon the statutes set forth in the appendix to appellants' opening brief.

At the close of its brief, respondent makes a contention that the Department will not be heard to controvert the construction of a state statute and a rule of public policy announced by the court of last resort of the state. This is a question-begging argument, for, as we have pointed out in this brief, the

Kuykendall case does not support respondent's contention as to the construction of Rem. Comp. Stat. Sec. 10379. Certainly the department is not bound by the Pacific Company's statement of the Supreme Court's construction of that statute.

Respondent contends that the department cannot question the purported construction of said statute, for the reason that it is the very statute which gives existence to the department and from which all its power and authority is derived. Even though the Supreme Court had construed the statute as respondent contends, and the department were bound by the construction of the statute creating it, respondent's contention falls, by reason of the fact that the Attorney General of the state is one of the appellants in this case, and his office is not created by that or any other statute, but by the constitution of the state (Art. III, Sec. 1, Constitution of Washington). His right of appeal is not affected by any construction, purported or otherwise, of said statute by the state Supreme Court.

CONCLUSION.

In conclusion we submit that the franchise rate provisions between the Pacific Company and the cities of Seattle and Tacoma, were in full force and effect at the commencement of this litigation; that they have never been terminated by any valid order of the Department of Public Works or Public Service Commission of the state of Washington; that they are binding upon the company and the question of confiscation is immaterial; that no Federal question arises and the Federal courts are without jurisdiction.

We further submit that the Department of Public Works having exercised its discretion by refusing to increase such franchise rates, cannot be compelled by the courts, either state or Federal, to exercise that discretion in a different manner.

We therefore respectfully submit that the decree of the United States District Court, for the Western District of Washington, Southern Division, entered May 19, 1926, was erroneous; that said decree should be reversed and the case dismissed.

Respectfully submitted,

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Attorney General of the State of Washington.

H. C. BRODIE,
Assistant Attorney General of the State of Washington.

Solicitors for Appellants.

THOMAS J. L. KENNEDY,
ARTHUR SCHRAMM,
Of Counsel.

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1937

No. 159

JOHN C. DEWEY, as Director of Public Works of Washington; O. O. CALLOMON, as Supervisor of Transportation of Washington; and C. RAY NOONE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellants,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Respondent.

APPELLANTS' MEMORANDUM OF ADDITIONAL AUTHORITIES

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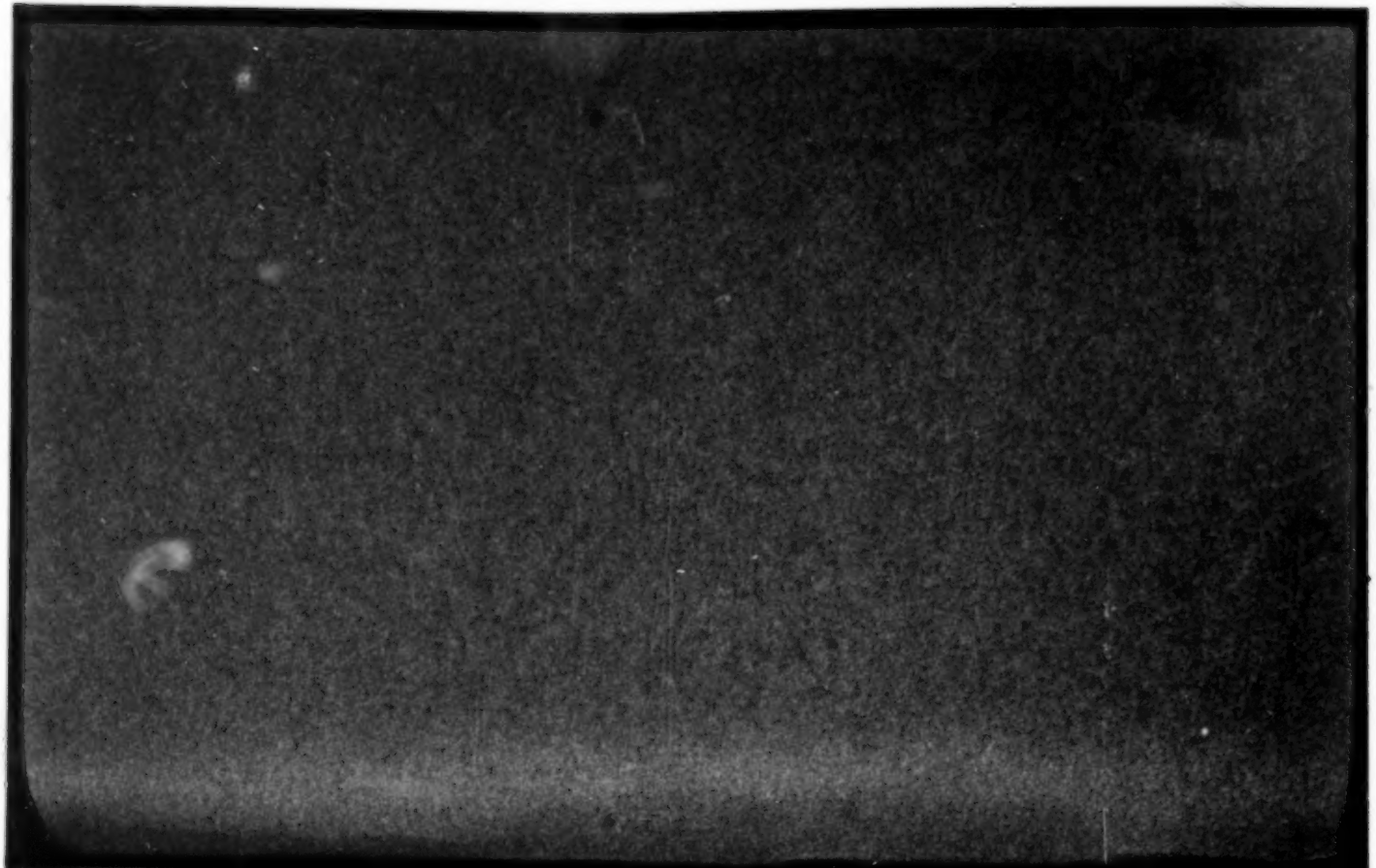

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927

No. 150

JOHN C. DENNEY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellants,*

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APPELLANTS' MEMORANDUM OF ADDITIONAL AUTHORITIES

Come now the appellants above named, and file herewith a list of additional authorities in the above entitled cause:

Wichita Railroad & Light Co. v. Public Utilities Comm., 260 U. S. 48; 67 L. Ed. 125, holding that a statutory provision permitting a public service cor-

poration to change its rates by filing with the Public Service Commission a schedule showing the changes, does not authorize such corporation to abrogate contract rates in that manner, and further holding that under a statute authorizing the Public Service Commission to change contract rates of a public service corporation if after hearing they are found to be unjust, an order changing a contract rate without such a finding is void.

Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co., 295 Fed. 895, holding that a Public Utility Commission cannot fix a new rate without a determination of the propriety of the change and without a finding that existing rates are unjust, unreasonable, insufficient or unjustly discriminatory; that before a contract fixing rates can be interfered with, under the police power, it must appear that the contract in some manner adversely affects the welfare of the public; and that the mere filing of a new schedule by a power company is not in itself a valid method of changing contract rates, since a power company cannot itself exercise the police power of the state to relieve it in the public interest from a burdensome contract.

Northern Pacific Ry. Co. v. St. Paul & Tacoma Lumber Co., 4 Fed. (2nd) 359, holding that a lawful change by the Department of Public Works of a rate fixed by contract, does not destroy the contract, but modifies its terms.

Suburban Water Co. v. Burrough of Oakmont, 110 Atl., 778 (Pa.) where the court said:

"While we have held that the acts of public service companies, under the Public Service law, supersede the acts of these companies with their patrons when they are in conflict, it is not exactly correct to say the entire contract is annulled. It may still be a contract between the parties *modified* or *enlarged* by the acts of either the company or the commission, under the Public Service law, and, if the consumer sees fit to recognize a change, it is still a contract." (Page 781.)

"The contract is simply *modified* or *reformed* so as to include for the time being the new rate fixed by law." (Page 782.) (Italics ours.)

North Coast Power Co. v. Public Service Commission, 114 Wash. 102, holding that contracts existing at the date of the Public Service law, could not be abrogated or suspended by either the going into effect of the law or the subsequent filing of a schedule fixing a rate different from that named in such contracts; that they constitute a class of their own, to be terminated only by order within the discretion of the Commission; and recognizing a distinction between existing contracts and those made after the enactment of the Public Service law.

JOHN H. DUNBAR,
Attorney General of the State of Washington.

H. C. BRODIE,
Assistant Attorney General of the State of Washington.

THOMAS J. L. KENNEDY,

ARTHUR SCHRAMM,
Of Counsel.